STATE OF MICHIGAN

COURT OF APPEALS

In re M. R. BROWN, Minor.

UNPUBLISHED
February 12, 2015

No. 323040
Calhoun Circuit Court
Family Division
LC No. 2001-001438-NA

Before: FORT HOOD, P.J., and JANSEN and GADOLA, JJ.

PER CURIAM.

Respondent Marlon Byrd appeals as of right from the trial court's order terminating his parental rights under MCL 712A.19b(3)(c)(*i*), (g), (h), and (j). For the reasons below, we affirm.

Respondent's daughter was taken into protective custody on April 1, 2012, after the Department of Human Services (DHS) discovered that the child's mother was previously homeless and was currently incarcerated for stealing a car and respondent was incarcerated at the Federal Correctional Institution in Pekin, Illinois for a felony conviction, with a projected release date of March 1, 2016. At a preliminary hearing on April 13, 2012, respondent requested the assistance of legal counsel and the court adjourned the hearing to appoint respondent an attorney. Thereafter, respondent was represented by counsel at every hearing, and appeared by telephone at all hearings except for a trial management conference on May 10, 2012, a review hearing on August 15, 2013, and a release of parental rights hearing on November 29, 2012, in which the child's mother relinquished her parental rights. During the proceedings, respondent was transferred on two occasions: first to the Federal Correctional Institution in Elkton, Ohio, and second to the Federal Correctional Institution in Milan, Michigan.

Respondent first argues that the lower court violated his constitutional parental rights because it allegedly chose to proceed with termination solely because the state refused to provide a juvenile guardianship subsidy for respondent's sister, who cared for respondent's daughter throughout the proceedings. We disagree.

Whether a child protective proceeding adequately protects a parent's constitutional due process rights is a question of law that we review de novo. *In re Sanders*, 495 Mich 394, 403; 852 NW2d 524 (2014). On appeal, respondent does not challenge the trial court's findings under the statutory termination grounds. When a party fails to raise an issue on appeal, the issue is deemed abandoned. *Berger v Berger*, 277 Mich App 700, 715; 747 NW2d 336 (2008). Nonetheless, we review for clear error a trial court's decision that a statutory ground for termination is established by clear and convincing evidence. *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012). A trial court's decision is not clearly erroneous unless the

reviewing court is left with "a definite and firm conviction that a mistake has occurred." *In re Trejo*, 462 Mich 341, 373; 612 NW2d 407 (2000).

There is no question that parents have a fundamental constitutional right to determine the care, custody, and control of their children. *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000). However, this right is not absolute as the state has a legitimate interest in protecting "the moral, emotional, mental, and physical welfare of the minor" and in some cases "neglectful parents may be separated from their children." *Stanley v Illinois*, 405 US 645, 652; 92 S Ct 1208; 31 L Ed 2d 551 (1972) (internal quotation marks and citation omitted). Because termination of parental rights implicates a fundamental liberty interest, courts must find by clear and convincing evidence that at least one of the statutory grounds exists under MCL 712A.19b(3) before terminating parental rights. *Trejo*, 462 Mich at 350; *Santosky v Kramer*, 455 US 745, 769; 102 S Ct 1388; 71 L Ed 2d 599 (1982).

Respondent contends that the lower court chose to terminate his parental rights solely because the state failed to provide a juvenile guardianship subsidy to respondent's sister, which would have given her the financial ability to continue caring for respondent's daughter. In his brief on appeal, respondent does not identify a legal or factual basis that would require the state to provide such a subsidy. We will not independently search out the legal or factual basis supporting a party's claim on appeal. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004); see also MCR 7.212(C)(7).

More important to our conclusion in this case is the fact that the lower court did not decide to terminate respondent's parental rights solely on the basis of the state's inability to provide respondent's sister with a guardianship subsidy. Rather, the court found clear and convincing evidence supported termination under MCL 712A.19b(3)(c)(*i*), (g), (h), and (j). MCL 712A.19b(3)(h) provides the following:

> The parent is imprisoned for such a period that [1] the child will be deprived of a normal home for a period exceeding 2 years, and [2] the parent has not provided for the child's proper care and custody, and [3] there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

MCL 712A.19b(3)(c)(*i*) and (3)(g) "are factually repetitive and wholly encompassed by MCL 712A.19b(3)(h)." *In re Mason*, 486 Mich 142, 165; 782 NW2d 747 (2010). In some circumstances, a parent may demonstrate proper care and custody by placing a child with a relative. *Id.* at 163-164. Under MCL 712A.19b(3)(h), the referenced two-year period begins at the termination hearing and includes both the time a respondent is incarcerated and the time needed after release to provide a normal home for the child. See *In re Perry*, 193 Mich App 648, 650; 484 NW2d 768 (1992) (explaining that this Court considers whether a child will be deprived of a normal home for two years following termination).

In this case, the court held the termination hearing on July 17, 2014, and respondent's anticipated release date was less than two years away on March 1, 2016. Although less than two years separated the termination hearing and respondent's release, the trial court noted that there was an outstanding warrant for respondent's arrest as the result of a Friend of the Court arrearage totaling nearly $5,000. Testimony also revealed that respondent could be released as early as

September 1, 2015, but the trial court noted that this earlier release date was speculative and respondent would be required to live in a halfway house for six to nine months following early release. The record contained no evidence that respondent ever held gainful employment before his incarceration, and respondent did not identify a specific plan to provide housing and income upon his release. Although respondent's daughter was placed with respondent's sister during most of the proceedings, respondent's sister stated she would request a transfer of respondent's daughter if his parental rights were not terminated because she could not afford to care for her. Respondent did not identify any other feasible relative placements. Moreover, the record does not reflect that respondent provided monetary or emotional support for his daughter during the proceedings. The lower court did not clearly err in finding termination was appropriate under MCL 712A.19b(3)(c)(*i*), (g), and (h).

The lower court also did not err in finding termination was warranted under MCL 712A.19b(3)(j). MCL 712A.19b(3)(j) provides that termination is proper if "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent." In this case, the trial court observed that respondent was unwilling to consider medical intervention when his daughter was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and depression, failed to demonstrate the ability to provide a stable physical home, failed to timely apply for therapy to address his tendency to participate in criminal behavior, and had only limited phone contact with his daughter throughout the proceedings. The lower court did not clearly err in finding termination was warranted under this factor.

Respondent also argues that the DHS failed to make reasonable efforts to provide reunification services while he was in prison. While this is question is closer than the one previous, we again disagree.

In determining whether the DHS fulfilled its duties to an incarcerated parent under the court rules and statutes, this Court considers whether the parent was "afforded a meaningful and adequate opportunity to participate." *Mason*, 486 Mich at 152. "In general, when a child is removed from the parents' custody, the petitioner is required to make reasonable efforts to rectify the conditions that caused the child's removal by adopting a service plan." *In re Fried*, 266 Mich App 535, 542; 702 NW2d 192 (2005). The reasonableness of the reunification services provided affects the sufficiency of the evidence offered to establish a statutory ground for termination of parental rights. *Id*. at 541. The fact that a parent is incarcerated does not relieve the state of its statutory duty to engage an absent parent with reunification services. *Mason*, 486 Mich at 152. Although the DHS has a responsibility to make reasonable efforts to provide reunification services, there is a commensurate responsibility on the part of a parent to participate in and benefit from any offered services. *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012).

In *Mason*, 486 Mich at 157, our Supreme Court held that the DHS failed to provide sufficient services to an incarcerated father when it was unclear whether the DHS sent a service plan to the respondent, the caseworker never "facilitated respondent's access to services" or "discussed updating the [service] plan," and the record contained no evidence that the caseworker contacted the prison social worker to discuss the respondent's need for services. Likewise, in *In re Smith*, 291 Mich App 621, 622-623; 805 NW2d 234 (2011), this Court held that the DHS failed to meets its statutory duty to provide services to an incarcerated parent when

no caseworkers visited the parent during the proceedings, initial correspondence with the parent stated that providing a treatment plan was not possible because of the incarceration, the DHS never created a parent-agency treatment plan, and the DHS focused all of its efforts on termination rather than reunification.

Unlike the circumstances in *Mason* and *Smith*, in this case, the record contains evidence that caseworkers attempted to engage respondent with services. A caseworker contacted respondent's prison counselor in Pekin, Illinois to discuss respondent's access to services. A caseworker also attempted to contact respondent's prison counselor in Elkton, Ohio and left messages that were not returned. Although the DHS could not provide certain services on its own in the federal prisons, the record indicates that respondent participated in comparable services while in prison, including a parenting class, counseling, and a real estate class. At the initial termination hearing on April 24, 2014, testimony revealed that caseworkers sent five letters to respondent, including a copy of his parent-agency treatment plan, and caseworkers attempted to contact respondent 12 times by telephone. However, because the court determined the DHS had not provided sufficient services to respondent, the court adjourned the hearing so the DHS could attempt to provide additional services. When the termination hearing continued on July 17, 2014, testimony indicated that a caseworker sent written correspondence to respondent and contacted the prison to seek out what other services were available. A caseworker also made several attempts to arrange for a psychological evaluation for respondent, but was unable to find a psychologist under contract with the DHS who could go into the prison.

Although the record suggests the DHS was not always successful in obtaining services for respondent due to his incarcerated status and his many transfers throughout the proceedings, the DHS made reasonable efforts to provide services. Moreover, respondent participated in many equivalent services while in prison, and participated in the proceedings by being represented by counsel at every hearing and by his personal telephone presence at a large majority of the hearings.[1] Accordingly, respondent had the opportunity to adequately and meaningfully participate in this case, and the lower court did not clearly err in terminating his parental rights.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Kathleen Jansen
/s/ Michael F. Gadola

[1] Respondent is to be commended for his participation in the services offered to him in prison, which he initiated of his own accord. However, his participation in those services does not change the fundamental legal fact that the trial court did not clearly err in its conclusion that one or more of the statutory grounds for termination of parental rights was satisfied. We also observe that but for the decision to withhold a guardianship subsidy for respondent's sister, this case might have reached a different conclusion.